LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 15 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~565~~ 23

NEROY CARTER,
Petitioner and Appellant Below,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. KIRKMAN JACKSON,
818 Massey Building,
Birmingham, Alabama,
Attorney for the Petitioner.

JACKSON, RIVES & PETTUS,
Birmingham, Alabama,
Of Counsel.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdictional statement	9
Question presented	9
Reasons relied on for allowance of writ	10
Prayer for writ	10
Brief in support of petition	11
Opinions of courts below	11
Jurisdiction	11
Statement of the case	12
Specification of errors	12
The argument	12
Summary of the argument	12
Point A	12
Point B	16
Conclusion	21

Table of Cases Cited

Coray v. *So. Pac. Co.*, 93 L. Ed. —	9, 10
Myers v. *Reading Co.*, 331 U. S. 477	9, 10, 14
L. & N. R. R. Co. v. *Layton*, 243 U. S. 612	9, 10, 13
Philadelphia & Reading Co. v. *Auchenbach*, 16 F. (2) 550	14
Tiller v. *A. C. L. Ry. Co.*, 318 U. S. 54	20
Western & A. R. R. Co. v. *Gentle*, 198 S. E. 257	15

Statutes Cited

28 U.S.C., Sec. 37	9
45 U.S.C., Sec. 2	13
45 U.S.C., Sec. 53	19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 565

NEROY CARTER,
Petitioner and Appellant Below,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This is an action under the Federal Employers Liability Act (R. 2) and the Safety Appliance Act (R. 20). It was commenced in the District Court of the United States for the Southern Division of the Middle District of Alabama.

The defendant had judgment. That judgment was affirmed in the court below, by the Court of Appeals for the Fifth Circuit.

Your petitioner, Neroy Carter, sued the respondent railway company for personal injuries received by him on February 2, 1946 at Panama City, Florida, while a trainman in its employ (R. 2).

As the Court below observes, the evidence is without serious dispute.

The accident occurred in the nighttime. It grew out of a switching operation controlled by light signals. The complaint charged that the injuries were received by the Petitioner as the result of the negligent operation of the cars at an improper rate of speed without regard to signals and in violation of the reasonably prudent and careful railroad operating procedures, as well as in violation of the Safety Appliance Act relating to automatic couplers. (R. 2, 3, 4, 5 and 20).

As shown by the map of the defendant introduced as Exhibit 1, there were multiple tracks at the point of the accident including main line, pass track, track No. 3, woodyard and lead tracks. The tracks ran generally in a northerly and southerly direction.

The car upon which the petitioner was riding at the time he was hurt was L. & N. Car No. 20042. It had been set out on the mainline (R. 59) south of the switch into the storage track (R. 27) and south of Pledgers Crossing and north of the lead track. From this point the intended switching movement was as follows: The engine, headed south, was to back up the mainline until north of the switch going into the storage tracks. It was then to proceed forward, going south on the inside storage track to couple to a box car, back out of the inside storage track and proceed into the outside storage track, where eight wood rack cars were to be picked up. After coupling to these eight cars

the engine, with the box car immediately next to it and the eight wood rack cars coupled to the box car, was to back out of the outside storage track onto the main line and thence north until the entire cut was in the clear, when the switch into the storage track would be thrown, and the cut moved south on the main line coupling to L. & N. Car No. 20042. Then all cars were to be pushed a distance of about a quarter of a mile (28 car lengths) into the woodyard and there placed at various points.

Carter occupied the position of swing brakeman or field man (R. 45). He had set L. & N. Car No. 20042 on the main line (R. 59) disconnecting the car from the engine, bleeding the air and preparing the coupler for the automatic coupling soon to be made (R. 107). Bleeding the air had the effect of setting the air brake on the car (R. 107).

After so placing the L. & N. Car the petitioner proceeded north to Pledgers Crossing (R. 107). He observed the engineer go into the inside storage track and couple to the box car of wood (R. 107). Then Carter instructed the engineer to go into the outside storage track and pick up the wood racks (R. 107). Carter returned to the L. & N. Car to be there when the coupling was attempted by the train, which had in the meantime pulled into the main line and was shortly to proceed south pushing the eight flats and the one box car (R. 107).

As the train proceeded south to make the intended coupling with the L. & N. Car, the other brakeman, Morrison, had taken his position at Pledgers Crossing to protect the train against vehicular traffic. He stood to the west of the train and on the engineer's side (R. 48) and as the train proceeded by him he climbed on a freight car about four or five car lengths ahead of the engine (R. 49) getting upon a corner of it. During this switching movement, the conductor had gone into a small shanty east of the main line where he was engaged in some paper work (R. 47) and

Carter was in charge of the operation. The other two members of the crew, Engineer Grant and Fireman James, were on the engine. Carter, standing by the L. & N. Car, west of the main line, gave the engineer the "slow, come ahead", so that the coupling could be made (R. 119 and 51). The coupling was attempted but failed on impact, and as Carter testified when he looked around at L. & N. Car No. 20042, after signalling the engineer, it was "rolling" (R. 108). It went south down the main line and into the lead track, going around a curve to the left (R. 109).

Carter testified that it was his duty to catch the car and set the brake upon it (R. 108) and that he ran 50 or 60 feet to do so, catching and getting upon it, where he straddled the bulkhead and applied the hand brake (R. 109) on the south end.

Going down-grade the runaway car had proceeded a distance of about six car lengths when Carter brought it to a stop. He looked up and saw the train bearing down on him out of the night and being at that time about twenty feet north of the north end of the L. & N. Car. Carter was astride the bulkhead on the south end of the car where he had just finished setting the hand brake (R. 111).

Carter braced himself against the anticipated impact. It occurred and caused the load in the car to shift to the north and Carter to be thrown from the bulkhead down onto the floor of the car (R. 111).

Just prior to the collision, Morrison, the footboard brakeman, who was riding in the cut about five cars ahead of the engine, came around the curve from the main line into the lead track (R 52). He testified he was looking for Carter at the time and he saw that the train and the L. & N. Car had not coupled (R. 52). He said it looked like there was about three car lengths between the head of his train and the L. & N. Car on which Morrison said he saw Carter

(R. 52). Thereupon Morrison testified he leapt ten or twelve feet to the ground and ran back across the pass track (then partially occupied by cars), and proceeded sufficiently far to the west so that his signal could be seen by the engineer (R. 54) whom he signalled to stop by giving the emergency or wash-out signal.

The speed at which the collision occurred is in dispute. Carter, the petitioner, said that in his judgment it was twelve to fifteen miles an hour (R. 111). Morrison, on the other hand, agreed more nearly with the version of the engineer that when he got off the train in order to stop it, it was traveling about five or six miles an hour (R. 54), and that it had begun to stop just about the time the collision occurred (R. 64). The brakes were never applied in emergency. While Morrison gave the wash-out signal calling for the application of the emergency brakes, the brakes were never applied in emergency (Testimony of Morrison—R. 55, and Testimony of Grant—R. 173).

The nature and extent of the petitioner's injuries are in dispute. The petitioner testified that he received injuries to his back which had caused him intense pain ever since. This was confirmed by the testimony of Dr. Thuss, a practicing physician of Birmingham, Alabama, whose deposition was taken and introduced at the trial. Dr. Thuss' diagnosis, confirmed by x-rays, showed a slipping forward of the last lumbar vertebra on the sacral segment. (See deposition of Dr. Thuss, page 5). Dr. Thuss diagnosed the petitioner's injury as a spondylolisthesis, which he said was a slipping forward of the fifth lumbar vertebra on the sacral segment with the impingement or the pressure or a partial collapse of the tissue between the vertebrae, which is referred to as the intervertebral tissue between the discs. The diagnosis of Dr. Thuss was confirmed by the testimony of Dr. Ellis, the chief surgeon of the respondent railroad company, who

said that Carter had a spondylolisthesis, but that it was a congenital infirmity. Dr. Ellis swore that the injuries didn't have anything to do with it. He said, "I think the thing just happened at that time." (R. 157). Dr. Ellis never denied the condition, only the cause of it.

Carter had been under the constant care and treatment of physicians since the time he had been hurt, including one siege of six weeks in Dr. Ellis' hospital in a cast, rigid on a board with his legs distended (R. 98).

The foregoing constitutes a general statement of the facts as shown by the evidence. There are further facts, favorable to the petitioner which should be mentioned for a proper understanding of the case. They are as follows:

1. It is shown without dispute in this record that the air brakes on the L. & N. Car (No. 20042) were set by Carter. He bled the air (R. 107). That sets the air brake on the car (R. 107). When the coupling was attempted a few minutes later with the train moving at that time about two miles an hour and coming ahead in response to Carter's signal to make the coupling, if the brakes had held or functioned properly even if the coupling had failed as it did, the L. & N. Car would not have moved off and begun its wild journey down through the yards in the dark. (See the testimony of Morrison, R. 57, and the testimony of Carter, R. 115). This is undisputed.

2. There was a company operating rule in force and effect at the time of the accident, known as Operating Rule 1011, and applicable to the conduct of engine men. The pertinent and concluding sentence of this rule is as follows:

> "If, in switching, the signals are lost to view stop must be made until signals can again be seen" (R. 43).

This accident occurred in the nighttime. The governance and control of the engine was by means of signals passed

to the engineer by the brakeman. The evidence shows without dispute that under these conditions and circumstances the rule was violated by Grant, the engineer. Grant couldn't see Morrison after he got aboard the train even though the train was moving at the time on a straight track (Testimony of Grant R. 145, and testimony of Morrison R. 50). And he couldn't see Carter after Carter ran east after the runaway car. If the engineer Grant had stopped the train as required by the rule when the lights of Morrison and Carter disappeared from view, the accident would not have occurred.

3. If the engineer had applied the brakes in emergency when Morrison gave the wash-out signal which the engineer either saw (or was negligent in failing to see, as it was his duty to look for the members of his crew) then according to his own testimony, confirmed by that of Morrison, the train could have been stopped short of the second impact which caused the collision (R. 54, 55 and 145). The engineer testified that he made a service application, which he said was a "slow stop" (R. 148).

On the other hand, there are two circumstances unfavorable to the petitioner which must be mentioned.

1. When L. & N. Car No. 20042 started off a runaway car and Carter started after it, he gave a signal to come ahead (R. 12). Grant, the engineer, says he received such a signal and acted on it (R. 131).

2. By way of preparation for coupling to L. & N. Car 20042 Carter opened both knuckles. Although denied by Carter (R. 119), the general superintendent of the railroad testified "such would diminish the likelihood of making a proper coupling as two pins would have to fall instead of one" (R. 181).

* * * * * * *

The Court below, in disagreeing with our contention that the Trial Court had erred in charging out any violation of the Safety Appliance Act observed:

> "The failure of the coupling to function automatically upon the first impact did not result in injury to the plaintiff. His injuries occurred when the train engineer, after this failure, in response to his signal to come ahead, continued to move forward, striking the woodrack car a second time. The train crew, with the exception of the plaintiff, all testified that the train was moving slowly, about four to six miles an hour; that they were not aware that the first coupling had failed, nor were they aware that the woodrack car had moved and was running wild as a result of the impact. Plaintiff admitted signalling the engineer to come ahead after the coupling failed the first time. He admitted that the coupling worked perfectly the second time. His injuries, therefore, may not be said to have resulted from a defective coupling. They clearly are chargeable to the second impact and the resulting fall.
>
> "Appellant argues that failure of the coupling to function automatically the first time resulted in the woodrack car moving forward and made it necessary that he board it and apply the brake to stop it; that the first failure to couple, therefore created a situation which resulted in the second impact; hence the original failure was the proximate cause of his injuries. The better view, we think, is that the failure to couple the first time created a condition or set the stage, with respect to which a new act was to operate. This new act began with plaintiff's signal to the engineer to come ahead, after the failure of the woodrack car to couple upon the first impact. It ended when the woodrack car automatically coupled on the second impact. *In these circumstances, the failure to couple on the first impact was the remote, not the proximate cause of plaintiff's injuries.* The authorities cited by the appellant to the effect that one failure to couple auto-

matically is enough to sustain a charge that the Safety Appliance Act has been violated are without application to the facts of this case. The court did not err in directing the jury to ignore this feature of the plaintiff's alleged cause of action" (Italics supplied).

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because

(a) It has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

Coray v. *Southern Pacific Co.*, 93 L. Ed. — (decided January 3, 1949);

Myers v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615;

L. & N. R. R. Co. v. *Layton*, 243 U. S. 617, 37 S. Ct. 455, 61 L. Ed. 953.

The statutory authority under which jurisdiction is invoked is 28 U. S. C. A. 37 (Judicial Code, Section 240, amended).

The date of the judgment to be reviewed is November 19, 1948.

Questions Presented

Did the Court of Appeals err in concluding that the railroad's conceded violation of the Safety Appliance Act could not have proximately resulted in the injuries sustained and (thus affirming the District Court in directing a verdict in favor of the respondent for that Act's infraction), and

Did the Court of Appeals err in failing to reverse for the palpable errors committed by the Trial Court in his charge to the jury on the law of the case.

Reasons Relied On for Allowance of Writ

The Court below has decided a federal question in a way probably in conflict with

Coray v. *Southern Pacific Co.*, 93 L. Ed. — (decided January 3, 1949);

Myers v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615;

L. & N. R. R. Co. v. *Layton*, 243 U. S. 617, 37 S. Ct. 455, 61 L. Ed. 953.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the proceedings of the said Circuit Court had in the cause numbered and entitled on its docket "No. 12328, *Neroy Carter, Appellant,* v. *Atlanta & St. Andrews Bay Railway Co., Appellee,*" to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court and for such further relief as to this Court may seem proper.

NEROY CARTER,
Petitioner,
By J. KIRKMAN JACKSON,
818 Massey Building,
Birmingham, Alabama,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 565

NEROY CARTER,
Petitioner and Appellant Below,

v.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Opinion of the Courts Below

The District Court rendered its judgment without opinion (R. 207); the opinion of the United States Court of Appeals for the Fifth Circuit is reported in 170 Fed. 719.

Jurisdiction

This has already been set forth in the preceding petition and is here adopted and made a part of this brief.

Statement of the Case

Under "Summary Statement of the Matter Involved," *supra,* a sufficient statement is made, fully to understand this case, and it is here adopted by reference.

Specification of Errors

The Court below erred in its approval of the action of the District Court in directing a verdict in favor of the respondent for its admitted violation of the Automatic Couplers Act as being the remote, and not the proximate cause of petitioner's injury.

The Court below further erred in failing to reverse for the many errors of the District Court in its oral charge to the jury on the law of this case, which in one instance was tantamount to directing a verdict for the defendant.

THE ARGUMENT

Summary of the Argument

A. The respondent concededly having been guilty of an infraction of the Safety Appliance Act, the Court below erroneously concluded as a matter of law that such offense was too remote to be the proximate cause of the plaintiff's injuries.

B. The Court below erroneously concluded that the several errors committed by the Trial Court in its charge to the jury on the law of the case were not prejudicial.

Argument

A. In regard to directing a verdict for the respondent for its conceded violation of the Safety Appliance Act:

The Court will remember the facts in regard to this aspect of the case.

L. & N. Car No. 20042 had been spotted on the main line by Carter. He was alone there at the time. He testified (and nobody disputes this because no one is in a position to do so) that after bleeding the air out of the car and thus setting the brakes, he prepared the coupler so that it would couple automatically on impact (R. 107). When the cut of cars came down the main line to couple to L. & N. Car 20042, Carter who alone was standing there and saw what occurred, testified that the coupling failed and L. & N. 20042 was started by the impact—a runaway down the track.

Morrison also knew of his personal knowledge that the coupling had failed. He testified when the car on which he was riding left the main line and proceeded sufficiently far into the lead track for him to see L. & N. Car 20042 ahead of him in the darkness, he saw there was an interval of about three car lengths between it and the head of the train.

There is therefore no question in this record that the automatic coupling on L. & N. Car 20042 failed to couple on impact.[1]

At the conclusion of the evidence counsel for the defendant moved for a directed verdict as to the alleged violation of the Safety Appliance Act. This motion the Court stated it would grant (R. 188) and did so in its oral charge to the jury (R. 190).

We rely here upon the decision of the Supreme Court in *Louisville & N. R. R. Co.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 455, 61 L. Ed. 953. The facts of the case which are extra-

---

[1] That part of the Safety Appliance Act pertaining to automatic couplers is as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with *couplers coupling automatically by impact*, and which can be uncoupled without the necessity of men going between the ends of cars." (45 U.S.C. § 2) (Emphasis supplied).

ordinarily like those of the case at bar are stated by the Court in the following language:

> "The plaintiff below was a switchman in the employ of the defendants when he suffered the injury for which he recovered the judgment which was affirmed by the Supreme Court of Georgia, and which is here for review on writ of error.
>
> "The facts essential to an understanding of the question presented for decision are as follows:
>
> "A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and *failed in an attempt to couple to the five cars*, but struck them with such force that, although the engine with the car attached stopped within half a car length the five loaded cars were driven over the two intervening car lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the tracks with the result that his right arm was crushed by the wheels and was amputated below the elbow." (Emphasis supplied.)

Here Carter may have signalled "come ahead." But this was contributory negligence at most and no defense at all as against a violation of the Safety Appliance Act.

One failure of an automatic coupler sustains a charge that the Act has been violated. It is immaterial whether it functioned perfectly before and after. Compare *Philadelphia & Reading Ry. Co.* v. *Auchenback*, 16 F. (2) 550 (cert. den. 2[illegible] S. 761) and *Myers* v. *Reading Co.*, 331 U. S. 477, 67 [illegible]. 1334, 91 L. Ed. 1615.

The Court below did not gainsay a violation of the Safety Appliance Act. On the contrary it conceded that it had occurred. It attempted to justify the action of the Trial Court in charging out preemptorily this phase of *Carter's*

case by saying that the violation did not proximately cause the injury.[2] It said:

> "In these circumstances the failure to couple on the first impact was the remote, not the proximate cause, of the plaintiff's injuries. The authorities cited by the appellant to the fact that one failure to couple automatically is enough to sustain a charge that the Safety Appliance Act has been violated are without application to the facts of this case."

In so concluding the Court below fell into the identical error of the Supreme Court of Utah in the recent case of *Coray* v. *Southern Pacific Company*, 185 Pac. (2) 963, here reversed on January 3, 1949. Mr. Justice Black observed:

> "The Utah Supreme Court reviewed the evidence here and held as a matter of law that the defective equipment did not proximately cause or contribute to the decedent's death. Court discussed distinctions between 'proximate cause' in the legal sense, deemed a sufficient cause to impose liability, and 'cause' in the 'philosophical sense' in that the stopping created a 'condition upon which the negligence of plaintiff's intestate operated', one perhaps of many causes 'so insignificant that no ordinary mind would think of them as causes.' The court added, however, that the stopping 'was not the legal cause of the result,' thereby classifying it as not 'a substantial, as well as actual factor in bringing about' the decedent's death.
>
> • • • • • • •
>
> "These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a

---

[2] No such reason motivated the District Court in charging out the Safety Appliance Act. He acted on one overruled and repudiated state decision to the effect that one failure of a coupling to work was not a violation of the Act. *Western & A. RR. Co.* v. *Gentle*, 198 S. E. 257 (R. 187). This action of the Trial Court could not be justified on the theory he adopted. The Court below attempted to justify it on other grounds, viz: lack of proximate cause.

motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

To paraphrase the rule of the Coray decision so as to make it here applicable: The coupler here was defective. For this reason alone the car became a runaway in the nighttime. True it is that Carter, darting in pursuit, gave a signal for his train to come ahead. Perhaps in doing so, he did not exercise the best judgment and he may have been guilty of negligence contributing to his own injury. But there had been a violation of the Safety Appliance Act. His own lack of care is no defense. Any way all of these various events are so inseparably related to one another in time and space that it was error not to let the jury decide the question.

B. As respects the manifest errors as to the law of the case in the Court's oral charge to the jury:

After directing the jury that it would be improper to find for the plaintiff for any violation of the Safety Appliance Act the trial court then undertook to charge on negligence and contributory negligence under the Federal Employers Liability Act.

The Court erroneously charged and repeated it no less than six times that if the plaintiff's negligence was the proximate cause of his injuries he could not recover in the action. We quote from the record in the language of the Trial Court in this respect:

". . . Under this Act if the employee is negligent, and the other fellow employees are also negligent, it would not defeat his right of recovery, the fact that he

was negligent, *unless his negligence was the proximate cause of the injury*" (Emphasis supplied) (R. 190).

The Trial Court further charged:

"If the plaintiff himself, who, under all of the testimony, negligently set the hand brake on the car, and *that was the proximate result of his injury, then his right of recovery would be cut off*" (Emphasis supplied) (R. 191).

And the Trial Court further charged:

". . . or if in setting that automatic coupling device he set it in a negligent manner, and that *was the direct and proximate cause of his injury, his right of recovery would be cut off*" (Emphasis supplied) (R. 191).

The Trial Court further charged:

". . . But *if you should find his own negligence was the proximate cause* of whatever injury followed, then it would make no difference about the extent or nature of the injury. Your verdict would have to be for the defendant" (Emphasis supplied) (R. 193).

The Trial Court further charged:

"If you find for the plaintiff, *and find he was not negligent in any manner, and that his injury was entirely the proximate result of the negligence of the engineer or some of the other employees at that time*, then you would award such measure of damages as in your judgment would reasonably compensate him for the injury that he has suffered" (Emphasis supplied) (R. 193).

The Trial Court charged further:

". . . but for his loss of time, earning capacity, and things of that kind, all would be proper matter for you to consider in awarding damages, if you find he is

entitled to any damages and *that his own negligence in no manner contributed to his injury*" (Emphasis supplied) (R. 193).

At the request of the petitioner, written Charge 3 was given in the manner following:

> "3. I charge you, as part of the law in this case, that the fact, if it be a fact, that the plaintiff may have been guilty of contributory negligence shall not bar his recovery, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to the defendant" (R. 194).

Thereupon, by way of explanation, the Trial Court, immediately following his reading of this requested charge, gave the following additional instructions:

> "You gentlemen of the jury are not lawyers, and I'm going to call your attention to that charge. It might be a little misleading, *under some other instructions of the Court. This is a correct rule of law if there was negligence on both sides, but would not come into play if you should find his injury was directly or proximately caused by his own negligence*" (Emphasis supplied) (R. 195).

Exception was reserved to these portions of the Trial Court's charge and the attention of the Trial Court was called to the fact that it had omitted the word "sole" as applicable to petitioner's alleged negligence as a bar to recovery. Thereupon the Trial Court stated:

> "The Court: I will modify it to that extent. That simply means whether his own negligence was wholly responsible for his injury. If he is totally responsible, it would not make any difference as to negligence on the other side" (R. 196).

Thereupon exception was reserved to that portion of the explanation to the effect that it "would not make any difference on the other side" (R. 196).

Exception was expressly reserved to the Court's gratuitous (and erroneous) explanation of the written charge #3 to the effect that while the rule therein stated is a correct rule, if there was negligence on both sides, but "would not come into play if you should find his own injury was directly or proximately caused by his own negligence" (R. 195) (Exception R. 196).

The Trial Court, in some way, got the proposition fixed in his mind that if the petitioner was guilty of any negligence whatever which proximately contributed to his injuries, this was a bar to his right of recovery. In accordance with this theory, no less than six times repeated, such was stated to be the law of the case, thus emphasizing and fixing in the minds of the jury that any contributory negligence whatever on the part of Carter would bar his recovery.

This, of course, is in direct violation of the Federal Employers Liability Act itself. The Act ordains liability if the carrier's negligence either "in whole or in part" causes the accident (§ 51 U. S. C. A. Title 45). Additionally and more specifically, the charge of the Court was directly contrary to Section 53 of the Federal Employers Liability Act (45 U. S. C. A. 53) which provides as follows:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided* . . ."

(Then the Act goes on to say that contributory negligence will be no defense at all for violation of the Safety Appliance Act.)

The decisions giving effect to these two sections of the Act are myriad, of which it is necessary to cite only

Tiller v. *Atlantic Coast Line Ry. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

The attention of the Trial Court to these errors was invited as follows:

> "Your Honor said if the plaintiff negligently caused his own injury he could not recover. If the plaintiff by his own negligence proximately caused his injury he couldn't recover. Your Honor omitted 'sole.' In other words, if the plaintiff's negligence were the sole proximate cause, of course he couldn't recover." (R. 196.)

The Trial Court did not withdraw those portions of the oral charge excepted to; did not amend the same by adding the word "sole," but only "modified" them to the extent stated by saying:

> "That simply means whether his own negligence was wholly responsible for his injury. If he is totally responsible, *it would not make any difference as to negligence on the other side.*" (Emphasis supplied.)

The last expression of the Trial Court (undertaking to correct the error, if you please) that "it would not make any difference as to negligence on the other side," is an egregious misstatement.

These errors, in the oral charge of the Trial Court were necessarily accentuated in the setting which we have above undertaken to describe. Of them the Court below decided that while standing alone they "might have been prejudicial, that considered in the light of the entire charge, if any prejudice resulted it was inconsequential."

This result was reached despite at least one of the six instances being in effect a directed verdict for the defendant. The Trial Court charged:

"If the plaintiff himself, *who under all the testimony, negligently set the hand brake on the car,* and that was the proximate result of his injury, then his right of recovery would be cut off." (R. 191.) (Emphasis supplied.)

Not only was it not true that "under all the testimony" the plaintiff "negligently set the hand brake on the car" as this charge categorically states but there was not a scintilla of evidence to that effect.

This was the general charge for the defendant. Yet the Court below says it was not prejudicial.

The Conclusion

The trial of this case in the District Court was replete with many errors. Some of them were seriously prejudicial to the petitioner, and as we submit, effectively precluded his obtaining a proper determination of his case.

In the foregoing brief we have not undertaken to raise all of them. We have undertaken to cabin our discussion to only two. In considering them we ask this Court to give proper weight to the cumulative effect of these errors and the many others disclosed in the record, which we have not here paused to argue. Weighed up together, the whole effect is conclusive.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

J. KIRKMAN JACKSON,
818 Massey Building,
Birmingham, Alabama,
Attorney for Petitioner.